

TOWARDS LOCATING THE NIGERIAN *SHARĪ'AH* PENAL CODES' PROVISIONS FOR WILLFUL HOMICIDE WITHIN THE *SHARĪ'AH*

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Abstract

The punishment for willful homicide under Islamic law is retaliation (qisās) that is death. However, relatives of the murdered are at liberty to waive this and accept compensation money (diyah) or pardon the culprit absolutely. These provisions of the Sharī'ah were not in force in Nigeria until 1999 when Zamfara State adopted Sharī'ah as its legal system and eleven other states later followed suit. With the creation of Sharī'ah Courts in those states to hear among other things, matters of criminal cases and the enactment of Sharī'ah Penal Codes to replace the long existing Northern Nigeria Penal Code in seven out of those eleven states, Islamic Criminal Law came into force in parts of northern Nigeria. This work examined the extent at which the Sharī'ah Penal Codes adequately incorporated the provisions of the Sharī'ah on willful homicide. Descriptive research method was adopted and data of the work were collected from printed materials and statute law. Findings of the work revealed that the Sharī'ah Penal Codes largely adhere to the Maliki School of Law which in some cases, proves to be harsher than the provisions of others. The paper asserts that the right to waive punishment and compensation or to uphold either of the two is with relatives of the murdered and not the judge or the authority. As a result, strict adherence to a specific school of jurisprudence may not adequately represent the interests of Nigerian Muslims

Keywords: Sharī'ah, Sharī'ah Penal Code, Willful Homicide, *Takhayyur*, Islamic Criminal Law

Introduction

Offences and punishments are integral parts of the *sharī'ah* (Muslim's way of life).¹ The punishments for offences under the *sharī'ah* are classified into: *hudūd* (fixed punishments) which include the punishment for *zina* (adultery and fornication), the punishment for *sariqah* (theft), and the punishment for *hirābah* (armed robbery); *qisās*, (punishments of equality or retaliation) which include the punishment for

homicide and injury; and *ta'zīrāt* (discretionary punishments) which are punishments for offences not expressly delimited in the primary sources of Islamic law and for which the judge is allowed to use his discretion in punishing the culprit.² These three categories constitute punishments for criminal offences under the Islamic law and because of its efficacy in remedying crime in places where it is practiced and because the practice of the law is considered a practice of the religion of Islam, sincere Muslims are always in the clamour for the adoption of the law as a legal system. In Nigeria, Muslims in the northern Nigeria represent the interests of other Muslims in the country in this respect.

Developmental Stages of *Sharī'ah* Implementation in Nigeria

Before the 1999 development in the implementation of *sharī'ah* in Northern Nigeria, the application of Islamic law in that region had gone through various stages. The first of the stages is the application of the law in the pre-colonial era when the emirs' courts were given the power to hear and determine criminal matters related to the *hudud*.³ Consequent upon the *jihād* of Uthman dan Fodio in 1808, the Alkali Courts were saddled with the responsibility of administering Islamic law in the Northern States of Nigeria in its fullest even though the Emirs still retained the power to adjudicate, appoint and remove the *Alkalis*.⁴ The second stage is its application during the colonial era. That was the time when the British occupied the northern states at a time when *sharī'ah* had already prospered as a well-defined and formidable legal system functioning as the only indigenous legal system in the same way it was to be found in that time only in Arabia.⁵ 1904 witnessed the introduction of the Criminal Code in Northern Nigeria with eight courts established to adjudicate on criminal matters. The 1906 proclamation instituted two types of Native Courts: the *Alkali* courts and the judicial courts. The *Alkali* Courts were to be managed by the *Alkalis* and the Judicial Courts by the Emirs. This year also marked the revival of the prerogatives of the Emirs and the return of the unlimited civil and criminal jurisdiction to the Emirs.⁶ The shortcoming of this provision as not adequately representing Islamic law was not noticed until in 1947 with the case of Tsofo Gubba vs Gwandu Native authority (12 W.A.C.A. 141(Supra). In this case, Gubba was found guilty of intentional homicide for killing a person he saw having an affair with his wife. The Emir of Gwandu's court therefore sentenced him to death because the action was considered as intentional homicide under Islamic law. Under English law, provocation of such a

type would only be considered manslaughter and the punishment would be lesser than capital punishment. In the light of this, the sentence was nullified.⁷ By implication therefore, the Native Court could apply Islamic criminal law only where there is no provision for such case in the nation's Criminal Code. The third stage which was still during the colonial era was the pre-independence period when an attempt was made to put Islam into serious bondage by systematically excluding the law from the definition of "written law" which implies that the British colonialist law is superior.⁸ It was then categorically stated that no person shall be tried for a criminal offence except for an offence which is codified under a written law⁹. This law was passed, accepted and entrenched in the 1960 Constitution of the country

Later came the era of post-independence when on October 1, 1960, the *Sharī'ah* Court of Appeal took off in full strength with a Grand *Qadi*, a Deputy Grand *Qadi* and three other judges.¹⁰ This was the time when Muslims in the north were made to accept a Penal Code that actually contained criminal offences as obtainable under the Islamic law but with the punishments for these offences differing from the provisions of Islamic law.¹¹ This law remained in use until the year 1999 even though Muslims in the northern region remained displeased with the development

In response to the yearnings of Muslim citizens, Zamfara State Government re-introduced the ever existing Islamic criminal law on the 27th day of January, 2000 and established *Sharī'ah* courts in the state with the power to exercise among other things, criminal jurisdiction of persons of Muslim faith or persons who consent to subject themselves to the jurisdiction of the *Sharī'ah* courts.¹² Eleven other states later followed suit. These states are: Niger, Jigawa, Kebbi, Sokoto, Yobe and Borno. Others are Gombe, Katsina, Bauchi, Kano and Kaduna.¹³ Seven out of these states enacted a codified law for the implementation of *Sharī'ah* and they are: Zamfara, Kano, Bauchi, Sokoto, Jigawa, Yobe, and Kebbi. Five of the States viz; Sokoto, Yobe, Kebbi, Jigawa and Bauchi adopted the Zamfara *Sharī'ah* Penal Code (SPC) which was the first to be enacted while Kano State Penal Code differs in some provisions.¹⁴ The newly enacted law provides for criminal offences as contained under the Islamic law and the offence of willful homicide is considered an integral part of the provision.

Willful Homicide (*Qatlu' amd*)

Willful Homicide is when a *mukallaf*¹⁵ deliberately uses an object that could kill, against a person whose blood is legally forbidden to be shed, such that the person subsequently loses his life in which case, one or more of the following rests on the shoulder of the murderer:¹⁶

- i. He has committed a grave sin as implied in the verse

وَمَنْ يَقْتُلْ مُؤْمِنًا مُتَعَمِدًا فَعَزَّازُهُ جَهَنَّمَ خَالِدًا فِيهَا وَغَضِبَ اللَّهُ عَلَيْهِ وَلَعَنَهُ
وَأَعَدَّ لَهُ عَذَابًا عَظِيمًا

If a man kills a believer intentionally, his recompense is Hell, to abide there in (for ever): and the wrath and the curse of Allah are upon him, and a dreadful chastisement is prepared for him.

(Qur'an 4:93)

- ii. He shall be denied inheritance and benefiting from the will of the murdered as stated by the Prophet thus:

عن عمرو بن شعيب عن أبيه عن جده قال قال رسول الله صلى الله عليه و سلم
ليس للقاتل من الميراث شيء

Amru bn Shuaibu reported that his father reported his grandfather as saying that the Prophet, may the blessing and peace of Allah be upon him, said: A murderer is not entitled to anything from the property of the murdered.¹⁷

- iii. He shall pay the blood money where the heirs consent to pardon him
iv. But if the heir(s) choose to retaliate, he shall be killed for the killing and that is *qiṣāṣ* in Islamic law.¹⁸

Willful homicide is recognised as a crime in northern Nigeria even before the 1999 development in the application of *Sharī'ah* in the region. The Penal Code¹⁹ provides for the offence thus:

Except in the circumstances mentioned in Section 222, culpable homicide shall be punished with death:-

- (a) If the act by which the death is caused is done with the intention of causing death; or

- (b) if the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was likely to cause.²⁰

Conditions for Establishing the Offence of Willful Homicide

The murderer who shall be subjected to *qisās* under Islamic law must be *bāligh* (mature) and must have intended to murder the murdered.²¹ In addition to the fact that the murderer must have acted on his own will, Abu Hanifah, Dawud and Shafi^ci in one of their two opinions stipulated that if he is coerced, the *āmir* (coercer) is to be subjected to *qisās* in view of the prophetic tradition where he mentioned that a believer shall not be punished for his mistake, forgetfulness and for being coerced.²² Maliki and Ahmad took the other extreme and opined that both the coerced (*ma'mur*) and the coercer (*āmir*) are to be subjected to *qisās*. They argued that even though the coerced (*ma'mur*) acted on the order of the coercer (*āmir*), he carried out the action that subjects one to *qisās* while he has option to his action. The other opinion of Shafi^ci is that the person coerced (*ma'mur*) is to be subjected to *qisās* and not the coercer.²³ Where the coercer has no authority over the coerced, Maliki, As-Shafi^ci, At-Thawr, Abu-Thawr and a group of others are of the opinion that the person committing the act (*mubāshir*) is to be liable for *qisās* and not the person who directed him (*āmir*)²⁴ but the consensus' view is that the coercer and the coerced should be subjected to *qisās* because the coerced had the option of disobeying even if that would cost him his life.²⁵

It is equally a condition that the murderer must not have killed the murdered in self-defense in view of the following tradition of the Prophet:

Abu Hurayrah, May Allah be pleased with him, said: A man came to the Prophet, may the blessing and peace of Allah be upon him, and said: O Messenger of Allah, what should I do if a man came to me wanting to collect my money? He said: Do not give him; he said what of if he fights me? He said: Fight him back. He said: What about if he kills me? He said: You died a *martyr*. He said: What about if I kill him. He said: He shall enter hell fire.²⁶

The murder must equally be carried out with what could be used in killing or its likes and the person murdered must have died as a result

of a fatal act of the accused²⁷ and whenever the act of the accused is not of the nature that could ordinarily cause death, the accused shall not be convicted for the offence of intentional homicide.²⁸ The person killed must equally be somebody whose blood is protected by law (*ma'sumud-damm*).²⁹ This is a person who has not committed an offence that would legally make him to be killed notwithstanding his colour, sex, religion, status, health, territory or age. The murderer must also not be a child to the murdered because the father shall not be killed for killing his son.³⁰ Scholars agree that the murderer must be of the same status with the murdered except in the issue of being one or more; being a Muslim or an unbeliever; being in bondage or free; and being a male or female.³¹ The areas of convergence and divergence of scholars on the issue of status of the murderer and the murdered are not considered in the *Sharī'ah* Penal Codes in the provision for the offence as observed in the section 200 of the Zamfara State *Sharī'ah* Penal Code.

Willful homicide is proved through the confession of the culprit in a clear and un-ambiguous statement and is accepted as a proof for the offence provided this confession is made by a sane, mature and free person who is in possession of his senses at the time of the confession and who is not coerced to confess.³² The witness of two upright men to the offence of willful homicide is equally accepted as a proof in line with the provision of the Qur'an

وَأَشْهِدُوا ذَوَيْ عَدْلٍ مِّنكُمْ

...and take for witness two persons from among you
(Qur'an 65:2)

Other means of proving the offence of homicide but for which jurists differ is *Qasāmah* (Multiple oath³³). Abu Hanifa, Maliki and Shafi'i are of the opinion that a group should be killed for the intentional murder of a person, while Maliki gave the exemption that when multiple oaths (*qasāma*) are adopted, only one person who is presumed as the principal murderer should be liable to *qiṣāṣ* while others should be imprisoned and given a hundred strokes³⁴

Punishment for the Offence of Willful Homicide

The Qur'an stipulates that murderers in willful homicide shall face the death penalty thus:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنْثَىٰ بِالْأُنْثَىٰ فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتِّبَاعٌ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ فَمَنْ اعْتَدَىٰ بَعْدَ ذَلِكَ فَلَهُ عَذَابٌ أَلِيمٌ وَلَكُمْ فِي الْقِصَاصِ حَيَاةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ

O you who believe, the law of equity is prescribed to you in case of murder. The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. That is a concession and a mercy from your lord. After this, whoever exceeds the limit shall be in grave chastisement. In the Law of Equality there is (saving of) life o you men of understanding, that you may restrain yourselves (Qur'an 2:178-179)

However, the victim's heirs may choose to excuse the murderer from the death penalty in exchange for monetary damages (*diyyah*) which is technically known in English as "blood money" or blood wit, but more appropriately referred to as "victim's compensation." In Islamic law, if the victim's representatives accept the victim's compensation, it is considered a pardon which in turn lessens the criminal's penalty.³⁵ The Prophet in one of his traditions, said: "anyone who is killed, his legal heirs have two options against his murderer: to exact *qisās* or to pardon him upon *diyyah*"³⁶ In a similar tradition, he said:

مَنْ أُصِيبَ بِدَمٍ أَوْ حَبْلٍ فَهُوَ بِالْخِيَارِ بَيْنَ إِحْدَى ثَلَاثٍ، فَإِنْ أَرَادَ الرَّابِعَةَ فَخُذُوا عَلَى يَدَيْهِ: أَنْ يَمُتَلَ، أَوْ يَعْفُو، أَوْ يَأْخُذَ الدِّيَّةَ،

Anyone who is killed, his legal heirs have three options against his murderer and if he requests for the fourth option, he should be cautioned: to kill (in vengeance) or pardon or take *diyyah*.³⁷

Payment of *diyah* and pardoning(*afw*) are considered better alternatives to retaliation in the offence of intentional homicide because, in cases of domestic violence, the victims or heirs may very well be related to the perpetrator. There will therefore be a conflict of interest when deciding on the punishment and use of *diyah*. An example of this is a case in which a man kills his brother. The brother's remaining family members all have a relationship in some way to the murderer himself and therefore, they may be more willing to forego the death penalty in order to spare the family more pain. Emphasising on the preference for pardoning, As-Shāfi'i observed that Allah stipulated retaliation in Jewish law, waiver in Christian law and *qisas*, *diyah* and pardoning in Islamic law.³⁸ This is in tandem with the hadith quoted by Ibn Kathir even though he posited that the option is only two: retaliation and *diyah*.³⁹ He reported thus

أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: «مَنْ أُصِيبَ بِقَتْلِ أَوْ خَبَلٍ فَإِنَّهُ
يُخْتَارُ إِحْدَى ثَلَاثٍ: إِمَّا أَنْ يُقْتَصَّ، وَإِمَّا أَنْ يُعْفَوْ، وَإِمَّا أَنْ يَأْخُذَ الدِّيَّةَ

The Prophet, may the blessing and peace of Allah be upon him, said: Anybody that is afflicted with the murder (of his brother) or injury shall be given to choose between three options: to retaliate or to forgive or to take the monetary compensation.⁴⁰

Recognised forms of punishments for wilful homicide by the earlier Northern Nigeria Penal Code are Death penalty when the homicide is not one of those mentioned in Section 222 of the penal code, and Life imprisonment or fine or both for homicide that is not punishable with death. The penal code does not recognise among other things *Diyah* (compensation money) for homicide not punishable with death, *Diyah* (compensation money) for homicide punishable with death but for which the heirs remit the death penalty and pardoning for homicide punishable with death but for which the heirs waive both the death penalty and the payment of *diyah*.⁴¹ The provisions of the Penal Codes are at variance with *Shari'ah* and that is the more reason why Muslims in that region are not comfortable with them.⁴² As an alternative to the Northern Nigeria Penal Code, the Nigerian *Shari'ah* Penal Codes which took effect from 1999 provide for the punishment in a more *Shari'ah* compliant term.

Section 200 of the Zamfara State *Shari'ah* Penal Code which reads the same with other SPCs, provides thus;

Whoever commits the offence of intentional homicide shall be punished

- (a) With death; or
- (b) Where the relatives of the victim remit the punishment in (a) above, with the payment of *diyah*; or
- (c) Where the relatives of the victim remit the punishment in (a) and (b) above, with canning of one hundred lashes and with imprisonment for a term of one year.

Provided that in cases of intentional homicide by way of *gheelah* or *hirabah*, the punishment shall be with death only.⁴³

Thus, the Nigerian SPCs recognise three different types of punishments for the offence of willful homicide. These are death penalty if the offence is punishable with death and the heirs demand it, *diyah* if the homicide is punishable with death but the heirs remit the death penalty, and caning and imprisonment if the heirs remit both the death penalty and the payment of *diyah*. In a further clarification of the provisions, Section 204 of Zamfara State SPC provides payment of *diyah* and not death in:

Except in the circumstances mentioned in section 200, intentional homicide is punishable with the payment of *diyah* and not with death in any of the following circumstances

(a) Where the offender is an ascendant of the victim or where the intention of the ascendant is clearly shown to be the correction or discipline of the victim; or

(b) Where the offender, being a public servant acting for the advancement of public justice, or being a person aiding a public servant so acting exceeds the powers given to him by law and necessary for the due discharge of his duty as such public servant or for assisting such public servant in the due discharge of such duty and without ill-will towards the person whose death is caused, or

(c) Where the offender, in the exercise in good faith of the right of private defense of person against whom he is exercising such right of defense without premeditation and without any intention of doing more harm than is necessary for the purpose of such defense.⁴⁴

This provision is adopted verbatim by all other SPCs except the Kano State SPC which, in Section 147(1) provides that if the offender is the father of the victim, the punishment shall be *diyyah* and imprisonment of a maximum of ten years, and for a civil servant who exceeds his limit in discharging his duty and thereby causes the death of the victim or somebody of good faith and who, in defending himself or his property, exceeds the power given to him by law and causes the death of a person. The two categories shall be liable to *diyyah* and imprisonment of a term which might be for life. The Maliki School provides that the father shall be killed for killing his son by malice while other schools opine that under no circumstance and for no reason shall the father be killed for killing his son.⁴⁵ Although the *Sharī'ah* Penal Codes claimed following the Maliki School, section 147 of Kano State SPC and Section 204 of the Zamfara State SPC do not agree with the school by failing to provide for the killing of one's son by malice.

Giving that Islam is a religion of mercy, the shedding of the blood of an innocent person is wrong as Islam seeks to establish a society that will be free from any sort of rancor or acrimony.⁴⁶ It is in consonance with this that Ala'iddin observed that despite the love for peace in the society, the heirs of the deceased should be given the option of taking revenge, taking *diyyah* or waiving the two without forcing any of the options on them.⁴⁷ But if one of the heirs chooses to pardon, others can no longer claim the death penalty. He added that to pardon the culprit without taking the *diyyah* is the best option.⁴⁸ In lending credence to this assertion, Sayyid Sabiq observed that:

القود أو العفو إما على الدية، أو الصلح على غير الدية،
ولو بالزيادة عليها.
كما أن لولي الجناية العفو مجاناً وهو أفضل.

(The punishment for intentional homicide is) retaliation or pardoning (with the option of) taking *diyyah* or not. Even if it is more than that, the heir has

the right to waive (*qisas*) without taking any compensation and that is even better.⁴⁹

Supporting the view of Sayyid Sabiq, Ali Rida, a contemporary exegete, gave strength to unconditional pardoning of a victim when dealing with willful homicide⁵⁰

Contrary to the view of scholars mentioned above, all the SPCs provide that even when the murderer has been pardoned and both death penalty and compensation money have been waived, the culprit shall still be punished with imprisonment and/or payment of fine.⁵¹ The necessity for specific discretionary punishment after the waiver of *qisās* and *diyah* by relatives of the murdered is equally a view of the Maliki school⁵² and unlike in some offences under Islamic law in which the individual does not have a say in the punishment, homicide is an infringement on the right of an individual and the person offended has the right to request that the murderer be punished or freed. It does not behoove of a judge or an authority to take over the right of the heirs because the Qur'an is categorical about that when it says:

...وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لَوْلِيَّهِ سُلْطَانًا

And if anyone is slain wrongfully, we have given his heirs authority (to demand *Qisās* or to forgive)...(Qur'an 17:33)

Life imprisonment as stated above might be considered outrageous. If the punishment of a pardoned murderer is viewed by the Maliki School as *ta'zīr* (discipline), a *ta'zīr* punishment is expected not to be of higher gravity to the original punishment for the crime⁵³. Ten years imprisonment and life imprisonment as contained in the *Sharī'ah* Penal Codes are both more severe than the payment for *diyah* especially where the payment of *diyah* is not to be shouldered by the murderer.

Conclusion and recommendations

Sharī'ah is considered by practicing Muslims as the right option to the mundane laws which are unable to withstand the challenge of time. However, there is the need to consider circumstances surrounding its application in any given locality. Even while strict adherence to a particular school of jurisprudence is not mandatory in Islamic law,⁵⁴ the provision for some offences in the *Sharī'ah* Penal Codes applicable in Nigeria is observed as being strict, a situation which may present the religion as being strict despite the abundant provision of facility to ease the practice of the religion. Having agreed that the [SPCs] are drafted in line with the provisions of the Maliki school, it should be understood that Islam is a religion of ease and if there will be a diversion from the Maliki school, the law should not provide for a more strenuous punishment. A situation where the Maliki school provides one year imprisonment and the *Sharī'ah* Penal Codes provide life imprisonment for the same offence, may be difficult to justify. Equally, under the principle of Islamic jurisprudence, *takhayyur*⁵⁵ is allowed with the objective of retaining the true spirit of Islam and providing for facility at the time of necessity. People entrusted with the codification of Islamic criminal law should exploit this opportunity in making provisions for offences under Islamic law.

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- 55 *Takhayyur* is a term of jurisprudence used to consider possible alternatives from a range of juristic opinions on a particular point of law with the objective of applying the least restrictive legal principle to issues on ground.